No. 10-828

Supreme Court, U.S.
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In the

Supreme Court of the United States

MICHAEL MEAD,

Petitioner,

v.

CITY OF COTATI a municipal corporation; PLANNING COMMISSION OF THE CITY OF COTATI; UNITED STATES FISH AND WILDLIFE SERVICE; and DONALD KOCH, in his capacity as Director of the California Department of Fish and Game,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY TO CITY OF COTATI AND PLANNING COMMISSION OF THE CITY OF COTATI'S OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MERIEM L. HUBBARD
Counsel of Record
PAUL J. BEARD II
Pacific Legal Foundation
3900 Lennane Drive, Suite 200
Sacramento, California 95834
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
E-mail: pjb@pacificlegal.org
E-mail: mlh@pacificlegal.org

Counsel for Petitioner

QUESTIONS PRESENTED

Nollan v. California Coastal Commission, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), require that conditions on development be related in nature and extent to the projected impact of a proposed development.

1. Does a land-use exaction that would be struck down as an unconstitutional condition under *Nollan* and *Dolan* if it is imposed as a required dedication of real property, become constitutional if the property owner is given the option of ransoming his land by offering a monetary payment to the government?

2. Does a land-use exaction that would be struck down as an unconstitutional condition under *Nollan* and *Dolan* if it were adjudicatively imposed upon a single individual, become constitutional if it is legislatively imposed upon all similarly situated property owners?

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Petitioner Michael Mead respectfully files this reply to the opposition to Petition for Writ of Certiorari (Opp.) filed by Respondent City of Cotati and Planning Commission of the City of Cotati.[1]

INTRODUCTION

Respondent City of Cotati claims that "[t]aking petitioner's theory to its logical endpoint, any regulation that resulted in a reduction of profits to a developer would be considered a physical dedication of property." Opp. at 10-11. In fact Mr. Mead's claim has nothing to do with reduced profits. Mr. Mead's argument is this: the City cannot hold a building permit hostage until Mr. Mead agrees to dedicate low-income housing, or fees in-lieu thereof, for no other reason than to further the City's affordable housing program. This Court should accept this case for review in order to make it clear that conditions such as this are subject to the standards set out in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

A ruling that the *Nollan* and *Dolan* standards apply to legislatively imposed exactions involving the dedication of an interest in property, or fees in-lieu thereof, would not "result in the wholesale expansion of the *Nollan/Dolan* test to all regulatory takings situations." Opp. at 11. Rather, such a ruling would represent a significant step towards advancing the broader constitutional takings principles intended to

[1] The Federal Respondent—the U.S. Fish and Wildlife Service—filed a Memorandum explaining that it takes no position on the Petition. Memorandum for the Federal Respondent at 5.

prevent a minority of citizens from shouldering a disproportionate share of public burdens. "The takings clause . . . protects against this majoritarian tyranny . . . by insisting that the costs imposed by government use or regulation of private property are borne by all to whom the benefits inure."[2]

I

MR. MEAD'S PETITION DEMONSTRATES A CLEAR CONFLICT AMONG STATE HIGH COURTS

Mr. Mead's first question arises from a split among state high courts as to whether the payment of a fee in-lieu of dedication of real property is subject to the nexus and rough proportionality tests of *Nollan* and *Dolan*. Mr. Mead demonstrates a clear conflict by summarizing various state court decisions that do not permit government to dodge the *Nollan/Dolan* standards by allowing payment of a fee in-lieu of dedication, and others that refuse to apply the nexus and rough proportionality tests to all forms of monetary exactions. Petition at 9-14. City chooses to ignore this conflict, instead arguing that its affordable housing regulation is (1) not a land-use exaction, and (2) does not require dedication of real property or a fee in-lieu thereof. Opp. at 1, 5, 6, 11.

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[2] James L. Huffman, *Colloquium on Dolan: The Takings Clause Doctrine of the Supreme Court and the Federal Circuit: Dolan v. City of Tigard: Another Step in the Right Direction*, 25 Envtl. L. 143, 152 (1995).

A. The City's Affordable Housing Condition Is an Exaction

The requirement that builders further the City's affordable housing policy by dedicating 20% of their proposed units to below-market housing, or paying a fee in-lieu of dedication, is an exaction. Exactions are defined in the literature as "[t]he process by which developers are required, as a condition of development approval, to dedicate sites for public or common facilities; construct and dedicate public or common facilities . . . make payments to defray the cost . . . of facilities . . . or otherwise provide . . . public amenities." Margaret Sonagi, *Exactions and Impact Fees in California* 15 (Solano Press 2001).[3] A builder who satisfies the City's ordinance by actual construction will be dedicating property at a below-market price when he sells or rents the units.

City cannot avoid *Nollan* and *Dolan* by claiming that landowners may pay an in-lieu fee instead of building low-income housing. As this Court explained in *Village of Norwood v. Baker*, an exaction may require the dedication of land or a real property interest, the payment of fees, or the financing of public improvements. *See* 172 U.S. 269, 279 (1898) (referring to an assessment against property for improvements to abutting road as an exaction). And many of the cases relied upon by the *Dolan* majority in formulating its "roughly proportional" nexus test involved fees: "All but one of the cases involve challenges to provisions . . . requiring developers to dedicate either a percentage of

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[3] The City must believe that the in-kind requirement (constructing the unit), land dedication, and the in-lieu fee are effectively the same—otherwise the ordinance would not allow compliance through these methods.

the entire parcel . . . or an equivalent value in cash." 512 U.S. at 400 (Stevens, J., dissenting).

The Ninth Circuit Court recognized the affordable housing condition as an exaction, saying only that "[a] generally applicable development fee is not an adjudicative land-use exaction subject to the 'essential nexus' and 'rough proportionality' tests of *Nollan* . . . and *Dolan*." Petitioner's Appendix (Pet. App.) A-4 (citations omitted).

B. A Requirement That Mr. Mead's Units Remain as Affordable Housing for at Least 30 Years Is a Transfer of Property to Further the City's Affordable Housing Policy

City seeks to escape the meaningful judicial review required by *Nollan* and *Dolan* by adopting a narrow view of what constitutes "a dedication of property." City claims that its affordable housing requirement is not an exaction because it does not require a property owner to transfer property or any property rights to the City. Opp. at 3, 6. The ordinance provides as follows:

> Inclusionary units produced in compliance with this chapter shall be legally restricted to occupancy by households of the income levels for which the units were designated, for a minimum of thirty years from the date of first occupancy for rental units, and . . . the date of each sale of any affordable unit for owner-occupied units.

City of Cotati Municipal Code, 17.31.040. Pet. App. E-5.

Here, as in *Nollan v. California Coastal Commission*, government appropriates the right to determine how a portion of the property will be used—a right that formerly inhered in the owner as an element of his "bundle of rights." In *Nollan*, the government demanded that the Nollans allow the public to traverse the beachfront portion of their private property. *Nollan*, 483 U.S. at 827-28. Here, the government demands that Mr. Mead allow a portion of his property to be used as affordable housing for no less than 30 years. The ordinance destroys the fundamental right to freely alienate a portion of the property by telling Mr. Mead to whom to sell or rent his property and how much to charge in sales price or rental. It is this appropriation of the use-right that makes the condition of development an exaction, not the formal transfer of title. Thus, it is appropriate to ask whether the use the government wants to impose on part of the property is reasonably related to the use the property owner proposes.

II

CITY FAILS TO RECOGNIZE THAT JURISDICTIONAL REQUIREMENTS ARE MET WHEN PETITIONER SEEKS RESOLUTION OF AN IMPORTANT QUESTION OF FEDERAL LAW

The Ninth Circuit Court held that *Nollan* and *Dolan* do not apply when conditions on development are imposed by legislation of general applicability. Pet. App. A-4. That holding raises "an important question of federal law that has not been, but should be, settled by this Court." Supreme Court Rule 10(c); Petition at 20-21. City's argument centers around a belief that

this Court has resolved the issue, but that is not true. *See, e.g., Garneau v. City of Seattle*, 147 F.3d 802, 811 (9th Cir. 1998) ("[T]he Supreme Court has left unsettled the question whether *Dolan*'s rough proportionality test applies to legislative, as opposed to administrative exactions. Lower courts and commentators have also struggled to determine whether the test applies to fee exactions . . . ." (footnote omitted)).

This Court has ruled on only two exactions cases—*Nollan* and *Dolan*. The viability of the *Nollan/Dolan* takings tests in the context of development exactions generally was confirmed in *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 548 (2005) ("[W]e reaffirm that a plaintiff seeking to challenge a government regulation as an uncompensated taking of private property may proceed . . . by alleging . . . a land-use exaction violating the standards set forth in *Nollan* and *Dolan*."). But this clarification does not address the applicability of *Nollan* and *Dolan* to legislatively imposed exactions, and the question remains unanswered.

City cites *City of Monterey v. Del Monte Dunes at Monterey, Ltd. (Del Monte Dunes)*, 526 U.S. 687, 702 (1999), in support of its claim that this Court has repeatedly limited *Nollan* and *Dolan* to land-use exactions requiring the dedication of property to public use. Opp. at 10, 12. *Del Monte Dunes* does not even address the issue of excessive exactions. In that case, the question was whether *Dolan*'s rough proportionality test extends to permit denials. In *Dolan*, the standard made sense: the City there could calculate the traffic impact created by Mrs. Dolan's enlarged store and it could assess the proportionate

amount by which a bicycle trail could reduce the impact. But such an approach is not helpful in assessing whether a permit denial fails to substantially advance a legitimate governmental interest—after all, it is difficult to determine whether a permit denial is roughly proportional to anything. As this Court said, the proportionality standard

> was not designed to address, and is not readily applicable to, the much different questions arising where, as here, the landowner's challenge is *based not on excessive exactions but on denial of development*. We believe, accordingly, that the rough-proportionality test of *Dolan* is inapposite to a case such as this one.

Del Monte Dunes, 526 U.S. at 703 (emphasis added). *See City of Olympia v. Drebick*, 83 P.3d 443, 451 (Wash. 2004) ("[A] *Dolan* proportionality analysis was inapposite in *Del Monte Dunes* because the government did not exact land or money.").

The refusal of lower federal courts and state courts to apply the nexus and rough proportionality tests to legislatively imposed conditions on development conflicts with this Court's decisions in *Nollan* and *Dolan*. *See* Petition at 21 (noting that *Nollan* and *Dolan* both involved conditions applied to new development generally). And, all but one of the cases relied on by the *Dolan* majority in formulating the "rough proportionality" test involved municipal ordinances—legislation of general applicability—requiring developers to dedicate property or cash to help finance the construction of public facilities. *See Dolan*, 512 U.S. at 400 (Stevens, J., dissenting).

Both *Nollan* and *Dolan* support the view that the constitutional infirmity results, not from the precise nature of an exaction, but rather from the lack of an adequate nexus between an exaction and the use of property. Without a close connection between the condition imposed on the use of land and the social evil that would otherwise be caused by the unregulated use of the owner's property, a permit condition is "not a valid regulation of land use but 'an out-and-out plan of extortion.'" *Nollan*, 483 U.S. at 837 (citations omitted). Thus, when the court of appeal below found that the nexus standard of *Nollan* and the rough proportionality test of *Dolan* apply only to nonlegislatively imposed exactions of real property, it wrongly focused its attention entirely on the nature of the exaction, when it should have focused on the impediment that is being imposed on the exercise of a constitutional right. In other words, what is unconstitutional is that a landowner is forced to undertake an involuntary action that is not related in any real degree to any impact caused by the proposed use of the land. The particular type of involuntary action and the manner of imposition is far less important to the analysis than is the lack of nexus and proportionality.

This Court should grant review to explain the true reach of the Takings Clause.

III

MR. MEAD'S REGULATORY TAKINGS CLAIM IS RIPE

The Ninth Circuit Court properly exercised its prudential jurisdiction by assuming without deciding that the case was ripe. Pet. App. A-4. *See, e.g.*,

Suitum v. Tahoe Reg'l Planning Agency, 520 U.S. 725,738-39 (1997) (quoting *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 191 (1985)). And this Court recently held that compliance with the second prong of *Williamson County*—"seeking compensation through state procedures"—is not jurisdictional. *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*, 130 S. Ct. 2592, 2610 (2010).

City misses the mark when arguing that "[t]he District Court found Petitioner's claims were not ripe for review because he had not satisfied either prong of the ripeness test . . . in *Williamson County*." Opp. at 4. In fact, the district court ruled that "[t]he City's decision is 'final' because Plaintiff has been told how he will be allowed to develop his property." Pet. App. B-16, 17.

Mr. Mead did not seek compensation in state or federal court, for the simple reason that, in exactions cases, the deprivation of property does not occur until such time as the property owner is forced to comply with the condition on development. In other takings tests, which focus on the impact of regulation on the use of property, the deprivation occurs when the decision limiting the use of property is final. Exactions cases are different because the deprivation of property does not occur until the property owner is forced to comply with the exaction at some time after permit approval and before issuance of a building permit. Put another way, the deprivation is dependent upon an affirmative act by the property owner.

Mr. Mead has not complied with the affordable housing condition, has not received a building permit, and has not begun to build the proposed development.

Yet, the applicable statute of limitation and rules of accrual required that he formally object to the affordable housing condition within 90 days of approval of his development project, and file a lawsuit 90 days later. Cal. Gov't Code § 66020. For these reasons, Mr. Mead does not seek compensation, but requests only declaratory and injunctive relief.

City's position that the only remedy available to Mr. Mead is just compensation, Opp. at 7, has not been adopted by this Court. Neither the Nollans nor Mrs. Dolan dedicated any property before seeking to have the conditions on their projects ruled unconstitutional. Justice Stevens, dissenting in *Dolan*, argued that the case was premature because no taking had yet occurred, so there was no infringement on the constitutional right to compensation. *See Dolan v. City of Tigard*, 512 U.S. at 408 (Stevens, J., dissenting). But the majorities in *Nollan* and *Dolan* recognized that a taking had occurred and declared the conditions unconstitutional.

CONCLUSION

For these reasons the petition should be granted.

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Respectfully submitted,

MERIEM L. HUBBARD
Counsel of Record
PAUL J. BEARD II
Pacific Legal Foundation
3900 Lennane Drive, Suite 200
Sacramento, California 95834
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
E-mail: mlh@pacificlegal.org

Counsel for Petitioner